IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.1820 OF 2003
WITH
WRIT PETITION NO.910 OF 2004

Cable Corpn. Of India Ltd. & anr. ..Petitioners.
Vs.
Union of India & anr. ..Respondents.

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Mr. Harish Jagtiani, Senior Advocate with Mr. Mohan Bir Ssingh for the Petitioners.
Mr. R.K. Sharma for Respondent Nos.1 and 2.
Mr. Arshad Shaikh i/b M/s. Sanjay Udeshi & Co. for the Intervenor.

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CORAM: DR. D.Y. CHANDRACHUD, J.

2nd August, 2006.

ORAL ORDER :

1. An order was passed by the Regional Provident Fund Commissioner directing the First Petitioner to deposit interest in the amount of Rs.31,01,050/- under Section 7-Q and damages in the amount of Rs.94,17,882/- under Section 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. A similar order was passed in the companion petition. An order imposing damages under Section 14-B is subject to an appeal under Section 7-I to the Tribunal constituted under the

provisions of the Act. This Court was moved in proceedings under Article 226 of the Constitution since the Appellate Tribunal was not functioning and the vacancy which had occurred in the office of the Presiding Officer had not been filled up by the Union of India. In the meantime, a notice had been received by the First Petitioner on 4th July, 2003 calling upon the company to deposit the amounts demanded in order to avoid further action. This Petition was accordingly entertained since it was not possible for the Petitioners to avail of the statutory remedy in appeal due to the non-functioning of the Appellate Tribunal. This Court has been informed that during the period from November 2004 to November 2005 or thereabout, an appointment had been made by the Union Government to the Appellate Tribunal but, that there has since been a vacancy which has not been filled. Ordinarily, when an alternative remedy is provided by statute, the Court under Article 226 of the Constitution would not be inclined to exercise the writ jurisdiction and would relegate parties to the remedy which is provided in law. The Petition has come up for hearing and final disposal and at present the vacancy in the Appellate Tribunal has not been filled up nor is there any such likelihood in the near future. In these circumstances, counsel appearing for the Petitioners,

counsel appearing for the Regional Provident Fund Commissioner and for the Union of India had jointly requested the Court to entertain the Petition on merits and to adjudicate upon the grievance that is urged in these proceedings. An intervention application that has been moved on behalf of the union has been allowed and accordingly an affidavit has been filed on behalf of Engineering Mazdoor Sabha. The Petition has accordingly been heard.

2. A notice to show case was received by the First Petitioner on 28th March, 2003. The notice alleged that the company had defaulted in paying the contributions that were due on account of the Employees' Provident Fund, Family Pension Fund, insurance fund and administrative charges. The period of default was allegedly between August 2000 and December 2002. An opportunity was granted to the Petitioner to show cause as to why damages should not be levied under Section 14-B of the Act. In response to the notice to show cause the Petitioner submitted a reply dated 3rd April, 2003 recording that the company had suffered a financial crisis due to market recession after 1997-98. The letter further stated that the accumulated losses of the company had

gone upto Rs.125 Crores until September 2002. As a result of the combined effect of depreciation, a high burden of loan repayment, heavy interest and lack of demand, the company claimed that it was unable to pay its statutory dues. The Petitioner admitted that the company had not been able to pay the Provident Fund contribution from May 2001. There was a reference to the fact that proceedings had taken place before the Industrial Court and that the company had been permitted to pay the statutory dues within a stipulated period. The employees' contribution had according to the company been paid in January, February and March 2003. The management stated that a request had been made to the Provident Fund Commissioner to allow it to pay the balance in 24 installments. On 20th May, 2003 a further reply was submitted to the Provident Fund Commissioner in which, while admitting that the contributions that were overdue were still to be cleared, the company once again adverted to the request that it had made for the grant of installments. The company recorded that on 17th May, 2003 an amount of Rs.58.20 lacs had been paid to the Provident Fund authorities. The company admitted its liability to pay interest on the defaulted amount, but made a request that damages / penalty may be condoned and waived in view of the financial

losses which had been sustained by it.

3. The impugned order was passed by the Regional Provident Fund Commissioner on 12th June, 2003. The order records that an opportunity was granted to the management to represent its case on five dates of hearing. The Deputy General Manager who appeared on behalf of the company submitted that he had not been able to verify the position in regard to the delay in making remittances with the records of the company. While admitting the delay, the company in the course of its submissions once again highlighted its financial position. The Regional Provident Fund Commissioner was, however, of the view that business hazards would not excuse the company from paying its statutory liabilities under the Act. The company had admitted its default. The Regional Provident Fund Commissioner accordingly directed the First Petitioner to pay damages quantified at Rs.94,17,882/- and interest quantified at Rs.31,01,050/- making a total demand of Rs.1,25,18,932/-.

4. On behalf of the Petitioners, it has been submitted that the order of the Regional Provident Fund Commissioner does not

consider any of the grounds which have been raised in the reply to the notice to show cause. The order, it was urged, does not contain any disclosure of the manner in which the period of delay, the interest liability or the damages have been computed. Learned counsel submitted that the company had existed for a period of 43 years during which there was no default in paying the Provident Fund dues. Though there was a default during the period in question, eventually all the dues have been paid and the only surviving question is in regard to the liability to pay interest and damages. Counsel submitted that the default was not willful and was due to adverse financial conditions. Consequently it is urged that the order which is impugned in these proceedings will have to be quashed and set aside and the proceedings remitted back to the Regional Provident Fund Commissioner for a fresh decision on the submissions which have been urged before the authority below.

5. While considering the submissions which have been urged on behalf of the Petitioners, it would at the outset be necessary to advert to the provisions of Section 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act,

1952. Section 14-B provides as follows :

> "14B. Power to recover damages – Where an employer makes default in the payment of any contribution to the Fund [, the [Pension] Fund or the Insurance Fund] or in the transfer of accumulations required to be transferred by him under sub – section (2) of section 15 [or sub-section (5) of section 17] or in the payment of any charges payable under any other provision of this Act or of [any Scheme or Insurance Scheme] or under any of the conditions specified under section 17, [the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf] may recover [from the employer such damages, not exceeding the amount of arrears, as it may think fit to impose."

6. The power of the Provident Fund Commissioner to impose an order of damages arises when the employer defaults in the payment of any contribution to the fund or in making transfers of accumulations required to be transferred or in the payment of charges payable under the Act, the scheme or under any of the conditions specified in Section 17. The Provident Fund Commissioner is in the eventuality of such a default empowered to recover from the employer such damages not exceeding the amount of arrears as he may think fit to impose. The provisions of Section 14-B were considered by the Supreme Court in the context of a constitutional challenge in **Organo Chemical Industries v.**

Union of India[1] Repelling the challenge that there were no guidelines governing the exercise of the power under Section 14-B, Mr. Justice V. R. Krishna Iyer in the course of the judgment observed that the provision requires that a hearing be given to an affected party and that reasons be recorded in the order awarding damages. A glaring error would be corrected in the exercise of the writ jurisdiction. The expression 'damages' was held not to be either vague or uncertain and the essentials of the concept are (a) detriment to one by the wrong-doing of another; (b) reparation allowed to the injured through legal remedies and (c)the quantum being determined by dual components, these being the losses suffered and a punitive or deterrent imposition under the law. Mr. Justice A.P. Sen in the course of his judgment noted that the power under Section 14-B is quasi-judicial; it must be exercised after due notice and an opportunity of being heard and the discretion to award damages can be exercised within the limits fixed by the statute. The order under Section 14-B, the Supreme Court observed, must be a reasoned order containing reasons in support. The judgment of Mr. Justice A. P. Sen holds that the expression 'damages' appearing in Section 14-B is, in substance, a penalty

1 AIR 1979 SC 1803.

imposed on the employer for a breach of his statutory obligation. The object of the imposition of a penalty under Section 14-B is meant to penalise the defaulting employer as much as to provide reparation for the amount of loss that has been suffered by the employees.

7. In **Hindustan Times Limited v. Union of India**[2] Mr. Justice M. Jagannadha Rao speaking for a Bench of two Learned Judges of the Supreme Court held that the determination of damages is not based on an inflexible application of a rigid formula and the authorities have to apply their mind to the facts and circumstances of the case. The principles that emerge from the decided cases were summarized thus in the judgment of the Supreme Court :

> "The authority under Section 14-B has to apply his mind to the facts of the case and the reply to the show cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard; the Regional Provident Fund Commissioner usually take into consideration the number of defaults, the period of delay, the frequency of default and the amounts involved; default on the part of the employer based on plea of power-cut, financial problems relating to other indebtedness or the delay in

2 (1998) 2 SCC 242.

> realisation of amounts paid by the cheques or drafts, cannot be justifiable grounds for the employer to escape liability; there is no period of limitation prescribed by the legislature for initiating action for recovery of damages under Section 14-B."

8. It is on the basis of the law as laid down by the Supreme Court in these cases that the challenge in the present case has to be considered. The notice to show cause that was issued to the Petitioners on 28th March, 2003 referred to the period of default as being between August 2000 to December 2002. The notice, however, informed the Petitioners that a statement showing the period of delay in making remittances would be made available based on a statement which would be submitted by the Petitioners on the date of hearing. Therefore, the notice to show cause was silent with regard to the actual delays that have resulted from time to time in the making of remittances. The Petitioners submitted two replies on 3rd April, 2003 and 20th May, 2003 pointing out that the company was suffering from adverse financial conditions as a result whereof the contributions had not been paid on time. The order of the Regional Provident Fund Commissioner that is impugned in these proceedings shows that on the one hand the representative who appeared on behalf of the company was

unable to provide any information on the exact delay in the remittances that were made of the statutory contributions due under the Act since the position had not been verified with the record available in the company. There is merit in the submission which has been urged on behalf of the First and Second Respondents and the Union that five opportunities were granted to the Petitioners for making their representation and there was no reason why the Petitioners did not provide a statement of their own account showing the dates on which payments were due and the dates on which payments were in fact made. The admitted position in the present case is that as a matter of fact there were delays on the part of the Petitioners in making the remittances of statutory contributions due under the Act and the scheme framed thereunder. The reply submitted by the Petitioners on 20th May, 2003 in fact contains an express admission of the liability to pay statutory interest under Section 7-Q of the Act. The letter dated 20th May, 2003 makes it abundantly clear that as of that date the establishment was still to clear the contributions that were due and payable in regard to the employees under the provisions of the Act. The company had set up a ground of financial stringency as a reason for its inability to remit the statutory contributions due and

payable under the Act. But, it cannot be overlooked that the company had also failed to pay the employees' share of contributions that were due and payable under the Act. The union had in fact been required to take recourse to proceedings before the Industrial Court in a complaint of unfair labour practices in which an order dated 11th December, 2002 came to be eventually passed, upon an undertaking filed by the company. Before the Industrial Court the submission that was made was that the company be directed to remit the Provident Fund contributions, LIC premiums and the loan repayments which have been deducted from the salaries of the employees and which had not been remitted. The Industrial Court passed an order. Despite the failure of the company to make the repayment of its dues no steps for recovery were taken by the statutory authorities. Thereupon a writ petition was filed before this Court. The petition was disposed of by a Division Bench of this Court on 9th April, 2003 when a statement was made on behalf of the Provident Fund Commissioner to the effect that criminal proceedings for non-payment had been adopted and action for recovery has also been pursued. At that stage, the Division Bench was informed that a sum of Rs.74 lacs had been deposited by the company and a

revolving guarantee had been furnished for the remaining amount. The Petition was disposed of since a statement was made on behalf of the Provident Fund authorities and an undertaking was furnished. This background, therefore clearly demonstrates that there was a default on the part of the company in not only paying its share of contribution under Employees' Provident Funds and Miscellaneous Provisions Act, 1952 but, in remitting the employees' share of contribution despite the fact that deductions had been made from the salaries of the workmen. In this background, the grievance now made before the Court on behalf of the Petitioners is that the order passed by the Regional Provident Fund Commissioner does not contain an adequate disclosure on the basis of the computation. However, it would not be appropriate to place the blame in its entirety on the Provident Fund authorities. The company was in possession of all the records including those relating to the dates on which payments were due and the point of time at which remittances were actually made. In such a case, it would not be adequate for the company to merely sit back and wait for a final determination by the Provident Fund Commissioner. It was necessary for the company to co-operate with the Provident Fund authorities by disclosing all the records in its possession and

custody so as to enable the competent authority to make an appropriate determination of whether a delay had in fact occurred and if so, the extent of the delay and the reasons for the delay.

9. Regulation 32-A of the Regulations that have been framed under the Act provides a sliding scale for the imposition of damages based on the period of default. Regulation 32-A is to the following effect :

> "32A. Recovery of damages for default in payment of any contribution – (1) Where an employer makes default in the payment of any contribution to the Fund, or in the transfer of accumulations required to be transferred by him under sub-section (2) of section 15 or sub-section (5) of section 17 of the Act or in the payment of any charges payable under any other provisions of the Act or Scheme or under any of the conditions specified under section 17 of the Act, the Central Provident Fund Commissioner or such officer as may be authorised by the Central Government, by notification in the Official Gazette, in this behalf, may recover from the employer by way of penalty, damages, at the rates given below :

Period of default	***Rate of damages*** ***(Percentage of arrears per annum)***
(a) Less than two months	Seventeen
(b) Two months and above but less than four months	Twenty-two
(c) Four months and above but less than six months	Twenty-seven
(d) Six months and above	Thirty-seven

Regulation 32-B empowers the Central Board to reduce or waive the damages that are leviable under Section 14-B in certain circumstances. Those circumstances and the extent of waiver are as follows :

> "(a) in case of a change of management including transfer of the undertaking to workers' co-operative and in case of merger or amalgamation of the sick industrial company with any other industrial company, complete waiver of damages may be allowed;
>
> (b) in cases, where the Board for Industrial and Financial Reconstruction, for reasons to be recorded in its scheme, in this behalf recommends, waiver of damages up to 100 per cent may be allowed;
>
> (c) in other cases depending on merits, reduction of damages up to 50 per cent may be allowed."

10. The power to impose damages under Section 14-B is a judicial power. As has already been noticed, Section 14-B does not mandate that an order for damages must follow in the event of every default. Section 14-B confers a discretion upon the Provident Fund Commissioner to impose damages not exceeding the amount of arrears. Within the ceiling that is imposed by the statute the Provident Fund Commissioner has a discretion. The nature of the power being quasi-judicial, the exercise of the discretion must be for sound and objective considerations.

Regulation 32-A under which a graded scale for imposition of damages has been provided cannot be regarded as a rigid or inflexible prescription. The Regulations cannot fetter the exercise of the power which is conferred upon the Provident Fund Commissioner by the provisions of the enactment, but guide and channelize the exercise of discretion. Similarly, Regulation 32-B structures the exercise of the discretion to reduce or waive the imposition of damages. Neither Regulation 32A nor Regulation 32B can be regarded as inflexible.

11. In the present case, there has been unquestionably a default on the part of the Petitioners. However, there is merit in the submission which has been urged on behalf of the Petitioners that the order of the Regional Provident Fund Commissioner is lacking essential particulars in so far as the quantification of damages is concerned. The order in fact contains no elaboration of the manner in which damages have been computed. On behalf of the Second Respondent it has been submitted that damages have been imposed on a sliding scale and that the memo of appeal submitted by the Petitioners before the Appellate Tribunal would reflect a consciousness of this position. Consequently, counsel

appearing on behalf of the Second Respondent submitted that the damages have been quantified in accordance with the schedule indicated in Regulation 32-A and the maximum rate at which damages have been levied is 37% per annum on the arrears, for a delay in excess of six months. Unfortunately, nothing that is stated at the Bar on behalf of the Second Respondent would appear ex facie from a reading of the impugned order. The Supreme Court has held in its decision in **Organo Chemical Industries** that the power under Section 14-B is quasi-judicial in nature and one of the safeguards against an arbitrary exercise of powers is the recording of reasons which would establish the basis or foundation of the determination. That unfortunately is not readily apparent from a perusal of the manner in which damages have been computed in the present case under Section 14-B of the Act. The order passed by the Regional Provident Fund Commissioner in the companion Writ Petition (Writ Petition 910 of 2004) on 10th December, 2003 in fact postulates that the statutory provisions do not permit the Regional Provident Fund Commissioner to waive, reduce or condone the levy of interest and penal damages under Sections 7-Q and 14-B respectively of the Act. This statement of law, in so far as Section 7-Q is concerned is unexceptionable. But the Regional

Provident Fund Commissioner has misapplied himself in holding that he had no power to reduce or condone the damages imposed under Section 14-B. The power under Section 14-B is coupled with a discretion and that discretion itself indicates that the power has to be exercised in an appropriate case.

12. Having regard to these facts and circumstances of the case, I am of the view that an order of remand is warranted in order to enable the competent authority to apply its mind afresh to all the facts and circumstances of the case and to pass a reasoned order on the quantification of damages. As already noted above, the order that has been impugned in these proceedings contained two components; the first component being the component of interest under Section 7-Q, while the other is the component of damages under Section 14-B. In moulding the relief that must be granted in these proceedings, I am of the considered view that it would be inappropriate for this Court to set aside the impugned order for a remand without putting the company on terms. The liability under Section 7-Q is a mandate of the statute since the employer is liable to simple interest at the rate of 12% per annum or at such higher rate as may be specified under the scheme on any amount due

under the Act. As already noted earlier, the First Petitioner has in its letter dated 20th May, 2003 specifically accepted its liability to pay interest under Section 7-Q. Therefore, I am of the view that as a condition of remand, the Petitioners must be directed to deposit with the Second Respondent the entire quantum of interest liability under Section 7-Q as quantified in the two orders that are impugned in these proceedings. The liability on account of interest is Rs.31,01,050/- in the order dated 12th June, 2003 that is impugned in Writ Petition 1820 of 2003. In Writ Petition 910 of 2004 the liability on account of interest under Section 7-Q is approximately Rs.1,28,301/-. In so far as the quantum of damages is concerned, the order which is impugned in Writ Petition 1820 of 2003 imposed damages to the extent of Rs.94.17 lacs while the order impugned in Writ Petition 910 of 2004 imposed damages to the extent of Rs.3.56 lacs. In my view, at this stage, while remanding the proceedings it would be necessary to direct the Petitioners to pay at least a certain portion of the damages that are claimed without prejudice to their rights and contentions. Counsel appearing for the Petitioners has fairly admitted that there was a default in paying the employees' contribution to the extent of Rs.58 lacs. Whatever be the ground of financial crisis, that cannot justify

the non-payment of employees' contributions which were liable to be deducted from the salary paid to the workmen. In my view, the ends of justice would be met if in addition to the quantum of interest under Section 7-Q the Petitioners are directed to pay an amount of Rs.10 lacs at this stage without prejudice to the rights and contentions of the parties.

13. Accordingly these Petitions are disposed of with the following directions :

i) The Petitioners shall within a period of six weeks from today deposit an amount of Rs.31,01,050/- and Rs.1,28,301/- being the liability on account of interest under Section 7-Q of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 as quantified in the impugned orders dated 12th June, 2003 and 10th December, 2003;

ii) In addition to the payment required under Clause (i) as above, the Petitioners shall within a period of eight weeks from today deposit a further amount of Rs.10 lacs on account of damages under Section 14-B;

iii) The aforesaid payments shall be without prejudice to the rights and contentions of the parties including the contentions which the Petitioners may have for demand in regard to the liability to pay damages under Section 14-B;

iv) Conditional on the making of the aforesaid payment, the impugned orders dated 12th June, 2003 and 10th December, 2003 shall stand quashed and set aside to facilitate a fresh determination by the Regional Provident Fund Commissioner;

v) In that event the Regional Provident Fund Commissioner shall make a fresh computation in regard to the quantum of interest liability under Section 7-Q and a determination in regard to the liability in respect of damages under Section 14-B after furnishing to the Petitioners an opportunity of being heard. The Petitioners shall produce before the Regional Provident Fund Commissioner a statement of account together with relevant records reflecting the dates on which the payments were due, the dates on which contribution was deducted and the dates on which the respective remittances were made to the Provident Fund

authorities;

vi) In the event that there is any default on the part of the Petitioners to deposit the aforesaid amount, the order of remand shall stand vacated and the impugned orders which have been passed by the Commissioner shall stand; and

Vii) In the course of the proceedings on remand before the Commissioner, Engineering Mazdoor Sabha, the intervenor in these proceedings, will be permitted to appear before the Provident Fund Commissioner, and will also be given an opportunity of being heard in the matter.

Leave to amend.

The Petitions are accordingly disposed of in these terms.

No costs.